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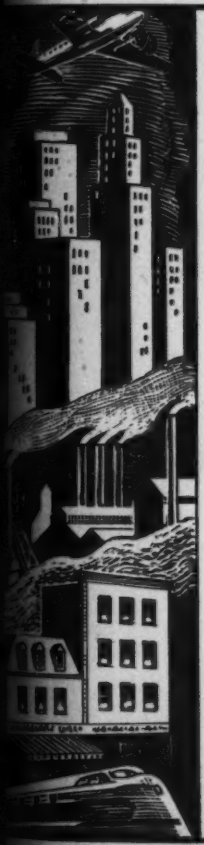

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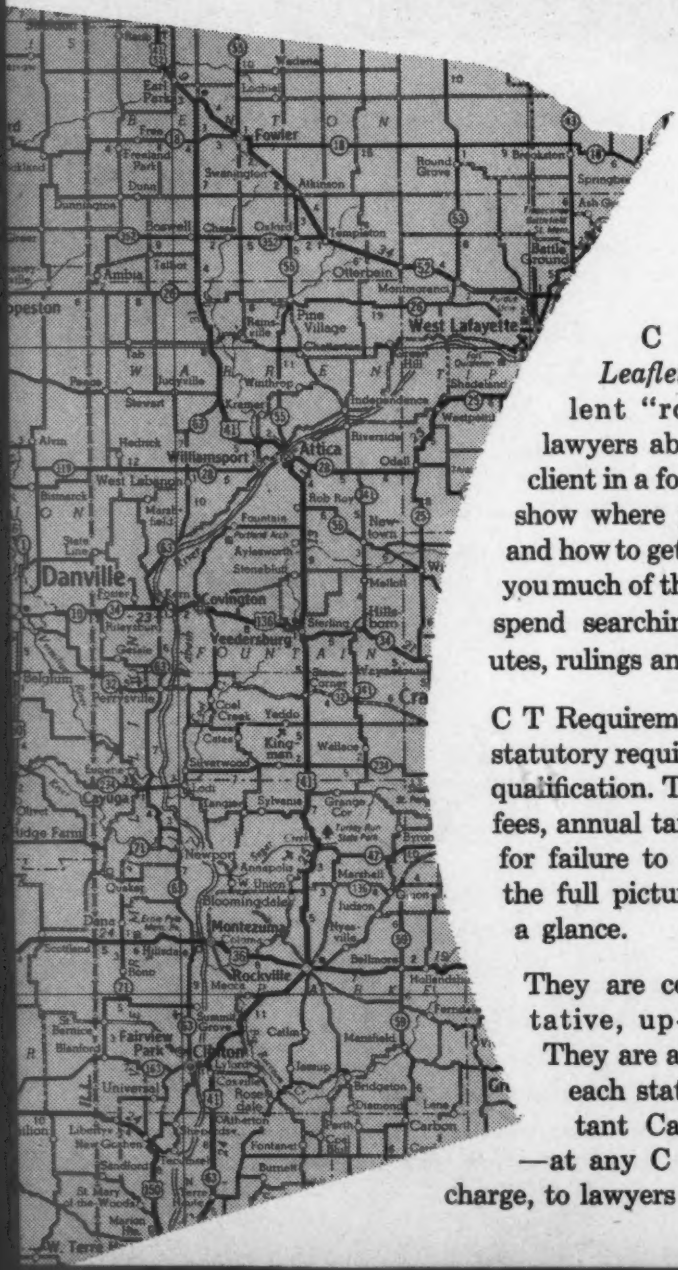

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unlicensed foreign corporations

North Carolina

Service Upon Secretary of State As Process Agent

FAR-REACHING PROVISIONS, affecting service of process upon unlicensed foreign corporations doing business in North Carolina, or having contacts with that state, either directly or through subsidiaries located there, are contained in Chapter 1143, Laws of 1955, (Senate Bill 545), which became effective May 20, 1955.[1]

General Transaction of Local Business

One provision of Chapter 1143 is found in the statutes of thirty-five states, in varying language. This stipulates that whenever a foreign corporation transacts business in the state without being licensed, or after its certificate of authority has been withdrawn, suspended or revoked, then the Secretary of State shall be the agent of the corporation, upon whom any process, notice or demand in any suit upon a cause of action arising out of such business may be served. This provision is in Section 55-38.05, added by Chapter 1143, effective May 20, 1955, the corresponding provision in the new Business Corporation Act being Section 55-144.[2]

A New and Unique Provision

A second new section of far wider interest and significance, added by Chapter 1143, Section 55-38.1, provides for "jurisdiction over foreign corporations not transacting business in this state." This section makes every foreign corporation subject to suit in the state by a resident of the state or by a person having a usual place of business in the state, *whether or not such foreign corporation is transacting or has transacted business in the state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:*

"(1) Out of any contract made in this State or to be performed in this State; or

"(2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or

"(3) Out of the production, manufacture, or distribution of goods

[1]The provisions of this Chapter also form Sections 55-144 to 55-146, inclusive, of the new North Carolina Business Corporation Act, which will become effective July 1, 1957. The appearance of these provisions in a separate act, Chapter 1143 of 1955, effective May 20, 1955, may be attributed to the uncertainty, early in 1955, surrounding the passage and effective date of the Business Corporation Act. The Legislature evidently deemed the subject of sufficient importance to justify the immediate enactment of these provisions in a separate bill, pending the deferred effective date of the new Corporation Law.

[2]Such service of process, made upon the Secretary of State as the process agent for an unlicensed foreign corporation, doing business, has been upheld, under Section 55-38, General Statutes, in *Lunceford v. Com. Trav. Mut. Acc. Assn.*, 190 N. C. 314, 129 S. E. 805, and *Harrison v. Curley et al.*, 226 N. C. 184, 37 S. E. 2d 489. This type of service has been upheld in many other jurisdictions, e. g., *Shippers Pre-Cooling Service v. Macks*, 161 F. 2d 510; certiorari denied, 340 U. S. 816, 71 S. Ct. 45.

by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or

"(4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or non-feasance".[8]

It is also provided that whenever a foreign parent corporation is subject to liability for any obligations of a subsidiary corporation which is subject to suit in North Carolina, the parent corporation is itself so subject in any action to enforce that liability. In any such action against a foreign corporation, service may be made on any person who could be served in an action against such a subsidiary corporation.

If such a foreign corporation has not voluntarily appointed and maintained an available registered agent, as outlined below, service of process in such suits may be made upon the Secretary of State as the agent of the corporation.

A third section added by Chapter 1143, Laws of 1955, Section 55.38.2, is concerned primarily with the mechanics of such service of process upon the Secretary of State and with his procedures in notifying the corporation of service of process. It stipulates that service so made is to have the same legal force and validity as if the service had been made personally in the state.

Voluntary Appointment of Registered Agent

It is also provided in Section 55-38.1, that any foreign corporation so subject to suit may, even though it is not transacting business in the state, appoint and maintain a registered agent, which agent may be either an individual resident of North Carolina, or a domestic corporation, or a foreign corporation authorized to transact business in the state. Such appointment is effected by filing with the Secretary of State a statement setting forth the name and address of the corporation and the address of its principal office, and the name and address in North Carolina of the registered agent. The registered agent so appointed becomes an agent of the corporation upon whom any process, notice, or demand in any cause of action arising under Section 55-38.1, outlined above, may be served. In any case where a foreign corporation is so subject to suit and fails to appoint and maintain a registered agent upon whom process might be served, or whenever such registered agent cannot with reasonable diligence be found at the address given, then the Secretary of State is made the agent of such a corporation upon whom any process in any such cause of action may be served.

The Secretary of State has approved a form acceptable for the voluntary designation of such a registered agent, to be used until the new Corporation Law becomes effective. A fee is not presently being charged for the filing of such a designation.

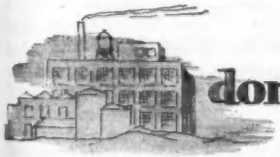
Maryland and Hawaii are jurisdictions where a foreign corporation en-

[8]In Maryland, a comparable, but less comprehensive, extension of jurisdiction over a foreign corporation is found in Section 88, Article 23, Maryland Annotated Code. There, service of process upon unlicensed foreign corporations has been sustained when made under Section 88, which contains provision for amenability to suit, under prescribed circumstances, "whether or not such foreign corporations is doing or had done business in this state." (*Johns v. Bay State Abrasive Products Co. et al.*, 89 F. Supp. 654; *Compania De Astral, S. A. v. Boston Metals Co.*, 107 A. 2d 357, certiorari denied, 75 S. Ct. 358.)

gaged in interstate or foreign commerce is required to designate a local or resident agent for the service of process. (*Maryland:* Annotated Code, Article 23, Section 86, *Hawaii:* Revised Laws of Hawaii, 1945, Chapter 157, Section 8391, as amended by Act 294, Laws of 1951.) There, however, the appointments are required to be filed, whereas in North Carolina the designation may be made voluntarily, at the option of the foreign corporation.

Franchise and Income Tax Liability

The Attorney General of North Carolina recently considered whether the appointment by a foreign corporation of a process agent under the provisions of Subsection (c) of G. S. 55-38.1, inserted by Chapter 1143 of the Session Laws of 1955, would constitute "doing business" in North Carolina within the meaning of the franchise and income tax articles. Under date of September 8, 1955, he expressed the view that "the mere appointment of a process agent under this subsection would have no effect on the question of whether the corporation is 'doing business' in this State for franchise and income tax purposes. Of course, if the agent has any other authority or duties in this State than those contemplated by Subsection (c) of G. S. 55-38.1, the corporation might then be doing business in this State".



domestic corporations

DELAWARE

Directors ruled not subject to liability for out of state taxes paid in good faith and in exercise of honest business judgment, where taxes were later held invalid.

Plaintiff stockholder brought two derivative actions against the directors of a Delaware corporation, seeking an accounting of profits claimed to have been made by the individual defendants at the expense of their corporation and for damages sustained by the corporation as a result of alleged breaches of duty to the corporation on the part of the individual defendants. After an examination of the evidence relating to such charges, the Court of Chancery, New Castle County, gave summary judgment for the director defendants "for failure to state a cause of action cognizable in this Court."

A cause of action involving an alleged civil conspiracy, taking place outside of Delaware and occurring more than three years before this suit was filed, was dismissed as barred by a Delaware three year statute of limitations.

Summary judgment was also given for the director defendants insofar as the complaint sought damages for their action in causing certain taxes to be

paid to Texas, which were subsequently declared unconstitutional by the Supreme Court of the United States. After an examination of the circumstances surrounding the precautions taken by the directors before making payment, the court, noting that the applicable Delaware statute of limitations specifies three years as the maximum period for the bringing of a tort action arising out of the state, observed that there was no intimation of any act of self-seeking fraud, bad faith or gross unfairness on the part of the individual defendants, and finding as a matter of law that the directors exercised honest business judgment in the matter, gave summary judgment for the defendant directors.

Glassberg, as Executor, etc., v. Boyd et al., 116 A. 2d 711. Robert C. Barab of Wilmington and Milton Paulson of New York City, for plaintiff. Killoran & Van Brunt and Berl, Potter & Anderson of Wilmington, Mudge, Stern, Baldwin & Todd of New York City, and Daniel Moody of Austin, Texas, for all defendants except Western Natural Gas Company. Morris, James, Hitchens & Williams of Wilmington, for defendant, Western Natural Gas Company. Commerce Clearing House Court Decisions No. 541918.

Fact that voting trust statute permits possible perpetuation of individual directors' and trustees' executive power does not invalidate voting trust, in absence of showing of statutory violation, fraud or overreaching.

Plaintiffs were majority stockholders of a Delaware corporation which held voting control of another Delaware company. The latter, in turn, controlled a third Delaware company which owned most of the stock of a foreign corporation which was not a party to the proceedings. This foreign corporation proposed to merge with the Delaware company which owned most of its stock. A meeting of the stockholders of this corporation was scheduled to vote on the plan of merger which had been approved by the directors of both corporations. Plaintiffs sought a temporary injunction against the voting of the stock of the foreign corporation by a voting trust which controlled the stock of the Delaware company last mentioned. If granted, this would prevent stockholder approval of the merger. Involved was the fact that six out of seven of the directors of the corporation in which plaintiffs held voting control were trustees of the voting trust of the stock of the Delaware company which was proposed to be merged. Plaintiff contended that the creation of this trust was an improper delegation of authority, taking the position that the directors of a Delaware holding company, substantially all of the assets of which consist of voting control of its subsidiary, may not lawfully delegate their management duties to trustees.

The Court of Chancery observed: "The fact that a liberal interpretation of the Delaware voting trust statute permits in the present case a possible perpetuation of executive power on the part of individual directors and trustees does not in my opinion invalidate the general voting trust in the absence of any showing of statutory violation, fraud or overreaching." Plaintiffs' motion for injunctive relief was denied.

Adams et al. v. Clearance Corporation et al., 116 A. 2d 893. John Van Brunt of Killoran & Van Brunt of Wilmington, and Miller Walton of Walton, Lantaff, Schroeder, Atkins, Carson & Wahl of Miami, Florida, for plaintiffs. Richard F. Corroon of Berl, Potter & Anderson of Wilmington, and Thomas R. Mulroy of Hopkins, Sutter, Halls, Owen and Mulroy of Chicago, Illinois, for the corporate defendants. Commerce Clearing House Court Decisions No. 542315.

Stockholder seeking injunction to prevent sale of corporate assets has burden of proving sale is in violation of fiduciary duty of directors and majority stockholders.

Plaintiff, a minority stockholder of the corporate defendant, suing for himself and all other stockholders, sought a permanent injunction against a proposed sale of assets of the corporation to the individual defendant. After stockholder approval of the sale, the case was tried and the consummation of the sale was held in abeyance by agreement pending decision by the Court of Chancery.

The court noted that it had many times held that there is a presumption that directors act honestly and in the best interests of the stockholders in negotiating a contract for the sale of corporate assets. Also, that in the absence of a showing that directors and majority stockholders are in some manner to share in profits arising from a sale of assets, proof of which was utterly lacking in this case, the requisite vote of stockholders authorizing the sale normally prevents court review of a sale of assets. After reviewing prior like decisions and the criteria employed, and applying them to the current situation, the court concluded that the plaintiff had not sustained the burden of proving the proposed sale of assets under attack to be in violation of the fiduciary duty of directors and majority stockholders and gave judgment for the corporate defendant.

Baron v. Pressed Metals of America, Inc., Court of Chancery, New Castle County, October 19, 1955. Robert C. Barab and Carl W. Mortensen of Wilmington and Nathan B. Kogan of New York, N. Y., for plaintiff. Berl, Potter & Anderson of Wilmington; Cleary, Gottlieb, Friendly & Hamilton of New York, N. Y., and Watson & Inman of Port Huron, Mich., for the corporate defendant. (*Motion for reargument denied, November* 14, 1955.)

When "non-liquid" assets of heavy industry business managed by family were sold, court indicates that a reasonable capitalization rate of seven or eight times normal earnings would approximate amount to be realized as a going concern value upon such a sale of assets.

Plaintiff stockholder brought this action to enjoin a sale of her corporation's "non-liquid" assets, seeking a recission of the contract and restoration of status quo. She charged the price specified was grossly inadequate. The Chancellor, after an examination of the circumstances surrounding the sale, supported

the defendants' use of a capitalization rate suggested by them. This was "a seven or eight times normal earnings capitalization rate." The court observed that "its use results in a going concern value not grossly disparate to the purchase prices." The plaintiff was regarded as having failed to sustain her burden of showing that the assets were legally undervalued when viewed from a going concern viewpoint.

Cottrell v. The Pawcatuck Company et al., 116 A. 2d 787. Arthur G. Logan and Aubrey B. Lank of Logan, Marvel, Boggs and Theisen of Wilmington and A. A. Berle, Jr., Rudolph P. Berle and Robert H. Seabolt of Berle, Berle, Agee & Land of New York City, for plaintiff. Henry M. Canby and Louis J. Finger of Richards, Layton and Finger of Wilmington for defendants, The Pawcatuck Company,. Donald C. Cottrell, Ridley Watts, Arthur M. Cottrell, Jr., and Charles P. Cottrell, Jr., Richard F. Corroon of Berl, Potter and Anderson of Wilmington and Paul J. Bickel and Elmer Jacobs of Cleveland, Ohio, for defendant Harris-Seybold Company. Commerce Clearing House Court Decisions No. 542316.

MINNESOTA

Service of process upon alleged "managing agent" of domestic corporation upheld.

In an action to recover for personal damages, in which the defendant domestic corporation alleged that it was never properly served, the lower court entered an order granting defendant's motion to quash the return of service. The plaintiff appealed to the Supreme Court of Minnesota.

Service was made pursuant to Rule 4.03(c) of the Rules of Civil Procedure providing that service upon a domestic corporation may be made by delivering a copy of the summons to a "managing agent" or "any other agent authorized expressly or impliedly" to receive service of summons. The person served was allegedly the "managing agent" of the corporation, which dealt in real estate. He was not an officer of the defendant and was not expressly authorized to receive service of process. He collected rents, issued checks for operating expenses and generally supervised the buildings owned by the defendant.

From an examination of the facts, the court concluded that the individual served was both a "managing agent" and an agent "impliedly authorized to receive service for the defendant", and accordingly, the ruling of the trial court was reversed.

Derrick v. The Drolson Company, 60 N. W. 2d 124, Thomas E. Dougherty and Thomas O. Dougherty, of Minneapolis, for appellant. Mordaunt & Mordaunt and Peter F. Walstad, of Minneapolis, for respondent.

NEW YORK

Court of Appeals affirms dismissal of derivative suit to recover sums paid by corporation in proxy struggle for election of directors, where stockholders ratified reimbursement to successful group.

In *Rosenfeld et al. v. Fairchild Engine & Airplane Corporation et al.*, 132 N. Y. S. 2d 273, (The Corporation Journal, October—November, 1954, page 30), the New York Supreme Court, Appellate Division, Second Department, dismissed a stockholders' derivative suit to recover sums paid by a corporation to cover the expenses of rival slates in a proxy struggle for the election of directors, under circumstances where the stockholders overwhelmingly ratified reimbursement to the successful group.

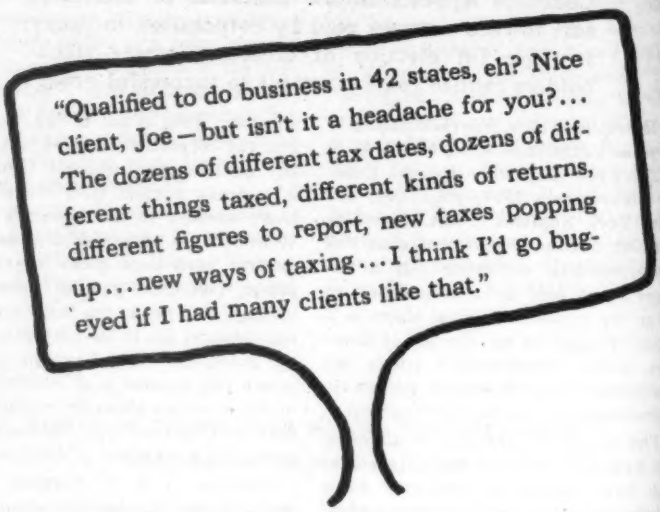
The Court of Appeals, in affirming the Appellate Division, said: "In a contest over policy, as compared to a purely personal power contest, corporate directors have the right to make reasonable and proper expenditures, subject to the scrutiny of the courts when duly challenged, from the corporate treasury for the purpose of persuading the stockholders of the correctness of their position and soliciting their support of their policies which the directors believe, in all good faith, are in the best interests of the corporation. The stockholders, moreover, have the right to reimburse successful contestants for the reasonable and bona fide expenses incurred by them in any such policy contest, subject to like court scrutiny. That is not to say, however, that the corporate directors can, under any circumstances, disport themselves in a proxy contest with the corporation's moneys to an unlimited extent. Where it is established that such moneys have been spent for personal power, individual gain or private advantage, and not in the belief that such expenditures are in the best interests of the stockholders and the corporation, or where the fairness and reasonableness of the accounts allegedly expended are duly and successfully challenged, the courts will not hesitate to disallow them."

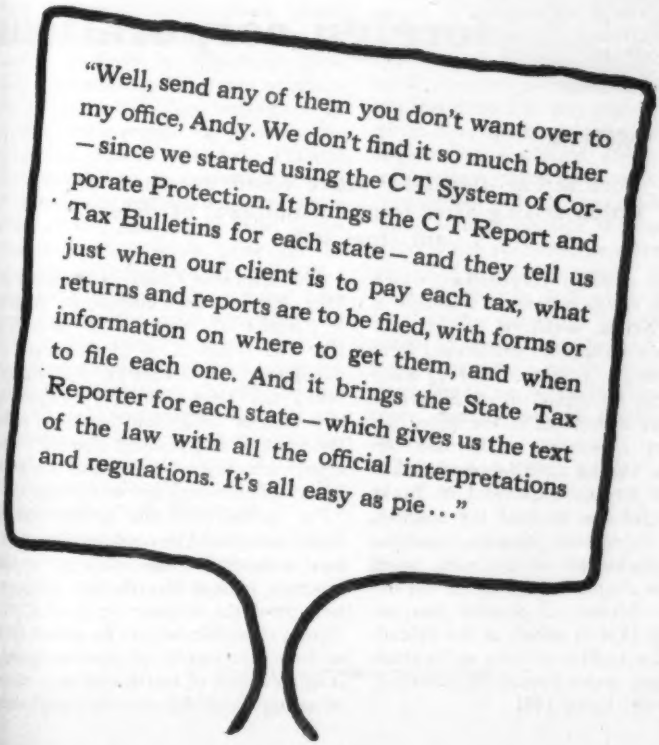
Rosenfeld et al. v. Fairchild Engine and Airplane Corporation et al.,* 128 N. E. 2d 291. Abraham Marcus, Alan J. Stein and William Rosenfeld of New York City, in pro. per., for appellant. Harold R. Medina, Jr. of New York City, for O. Parker McComas and another, respondents. Jacquelin A. Swords of New York City and William K. Zinke of White Plains, for Sherman M. Fairchild, respondent. Samuel J. Silverman of New York City, for James A. Allis, respondent.

* The full text of this opinion is found in the **New York Corporation Law Reporter**, page 9971-81.

Director, not re-elected, ruled to have a qualified right to inspect corporate books and records, covering period of his directorship, in discretion of trial court.

This was a proceeding in the nature of a mandamus for an order compelling the respondent corporation to permit the petitioner to inspect its corporate books and records. The petitioner was a director of the corporation, but not a stockholder, at the time he instituted proceedings to compel that inspection.


"Qualified to do business in 42 states, eh? Nice client, Joe – but isn't it a headache for you?... The dozens of different tax dates, dozens of different things taxed, different kinds of returns, different figures to report, new taxes popping up... new ways of taxing... I think I'd go bug-eyed if I had many clients like that."


"Well, send any of them you don't want over to my office, Andy. We don't find it so much bother — since we started using the C T System of Corporate Protection. It brings the C T Report and Tax Bulletins for each state — and they tell us just when our client is to pay each tax, what returns and reports are to be filed, with forms or information on where to get them, and when to file each one. And it brings the State Tax Reporter for each state — which gives us the text of the law with all the official interpretations and regulations. It's all easy as pie . . ."

While the matter was pending in court, he was not reelected as a director. The trial court granted his motion to inspect. The order granting inspection was affirmed by the Appellate Division. An appeal was taken to the Court of Appeals of New York by the corporation.

The court remarked that directors, "while in office, must protect not only their own interests, but also those of the corporation and of the stockholders," and that, consequently, their right to inspect has been made *absolute*. "It would seem to follow then, that, although he has no *absolute* right, a discharged director may have a *qualified* right to inspect the corporate books and records covering the period of his directorship, whenever in the discretion of the trial court he can make a proper showing by appropriate evidence that such inspection is necessary to protect his personal responsibility interest as well as the interest of the stockholders."

Cohen v. Cocoline Products, Inc., et al., 127 N. E. 2d 906. Elliot A. Wysor and Leonard S. Halpert of New York City, for appellants. Charles Gottlieb of New York City, for respondent.

foreign corporations

WEST VIRGINIA

Tort action dismissed where based on cause of action arising after formal withdrawal of defendant from state.

Defendant foreign corporation, which had been authorized to do business in West Virginia, withdrew in 1951, obtaining a certificate of withdrawal from the Secretary of State. Prior to withdrawal the defendant, in the course of its mining operations in the state, had permitted a stream to become obstructed. During a period of rainfall in 1952, the stream overflowed its banks and flooded the land of the plaintiff, causing substantial damage, resulting in the institution of this suit, based upon the alleged negligence of the defendant. Service of process was accepted in 1954 in behalf of the defendant by the Auditor of State as its attorney in fact, under Section 71, Article 1, Chapter 31, Code, 1931.

The Supreme Court of Appeals of West Virginia cited Section 84, Article 1, Chapter 31, Code, 1931, providing that the issuance of a certificate of withdrawal to a foreign corporation "shall not relieve the corporation of any debt or obligation due from it to the State or any resident thereof". The court, drawing a distinction between breach of contracts and torts, remarked: "The quoted provision of the statute does not operate to continue the statutory authority of the Auditor, as the attorney in fact of a foreign corporation, after the issuance to it of a certificate of withdrawal, to be served with or to accept service of process against it in an action of tort based on a cause of action which did not arise until after

the issuance of the certificate of withdrawal." The court regarded the suit as one in tort based on a cause of action which did not accrue to the plaintiff until after the corporation had obtained a certificate of withdrawal, and the acceptance of service by the Auditor of State as unauthorized and invalid. The court from which such process issued was regarded as not having jurisdiction over the corporation in such an action against it. A judgment dismissing the suit was affirmed.

De Board v. B. Perini and Sons, Inc., 87 S. E. 2d 462. John J. Justice and Clara W. Justice of Williamson, for plaintiff in error. Randolph Bias, Bias & Bias, of Wilmington, for defendant in error.

WISCONSIN

Foreign corporation ruled not required to be qualified in order to enforce Wisconsin Fair Trade Act agreement.

Plaintiff New York corporation sought to enjoin defendant, engaged in the jewelry business in Wisconsin, from selling watches manufactured by plaintiff at prices less than established by plaintiff under section 133.25, Stats., the Wisconsin Fair Trade Act. Plaintiff had entered into an agreement with a Wisconsin retailer under this section in which certain prices were listed as the stipulated retail resale price for all products manufactured by plaintiff, a copy of this agreement having been sent to the defendant by registered mail prior to the sales made by defendant at prices to which plaintiff objected. Defendant contended plaintiff did not have the legal capacity to sue, as it was an unlicensed foreign corporation. The lower court ruled in favor of the defendant and plaintiff appealed to the Supreme Court of Wisconsin.

Reversing the order of the lower court, the Wisconsin Supreme Court regarded the plaintiff foreign corporation as having legal capacity to sue. It felt that the same principle was to be applied to the carrying out in Wisconsin of the terms of the "fair trade" contract mentioned as was applied in cases where a foreign corporation ships merchandise in interstate commerce on consignment into a state to be sold on commission, and the consignment contracts usually provide the conditions under which the consignees are to hold and make sale of the goods. The court remarked that in such a situation, the acts of the consignee in selling the goods do not become those of the foreign corporation merely because the latter limits or regulates the manner, place, time, terms or details of the sales.

Bulova Watch Co., Inc. v. Anderson, 70 N. W. 2d 243. Rice & Ramsey, Richard M. Rice, of counsel, of Milwaukee, for appellant. Paul E. Bornemann of Milwaukee, for respondent.

taxation

ALABAMA

Alabama franchise tax ruled valid as applied to a foreign corporation.

Plaintiff foreign corporation, qualified and doing business in Alabama, appealed from an assessment of the franchise tax, imposed according to "capital employed" in the state. It sought to have "capital" redefined so as to include only the issued and outstanding capital stock, surplus and undivided profits and long term bonds maturing more than one year from accounting date, and that the actual amount of capital employed in Alabama could not exceed the aggregate sum thereof. The Alabama Supreme Court upholding the validity of the tax, adopted, in large part, an opinion of the Circuit Court of Montgomery County which rejected this interpretation and which ruled that all assets which have an actual or a legal situs in Alabama and which are used by a foreign corporation in Alabama for business purposes must be considered as the measure of the tax.

*Alabama Textile Products Corp. v. State,** Alabama Supreme Court, September 15, 1955. Albrittons & Rankin of Andalusia, for appellant. John Patterson, Attorney General, Willard W. Livingston and E. Grady Tiller for Revenue Department of State, of Montgomery, for appellee. Jack Crenshaw of Montgomery, amicus curiae. Commerce Clearing House Court Decisions No. 541926. (A like decision involving a foreign corporation whose entire business was carried on in Alabama is *Andala Company v. State*, also decided on the same day by the Alabama Supreme Court.)

* The full text of this opinion is printed in the **State Tax Reporter**, Alabama, pages 751 and 772.

MINNESOTA

Income tax held valid as applied to unlicensed foreign corporation engaged in interstate commerce.

Defendant Iowa corporation, not licensed to do business in Minnesota, was assessed for income taxes for its fiscal years from 1933 through 1948, inclusive, by the Commissioner of Taxation on the basis of returns prepared by that official from information available to him, the company having filed no returns. The corporation had maintained a sales office in Minneapolis. Salesmen operated from this office or from their homes in the state. Orders received were sent to defendant's home office in Iowa for acceptance and for filling in interstate commerce, direct to the customer, 48% of its entire sales being made to customers in Minnesota.

The Hennepin County District Court has upheld the tax as applied to the defendant, stressing that, as to such a foreign corporation, the tax was "definitely not a tax on the franchise of the corporation to do either a local business or an interstate business". The tax was

regarded as a tax on net income arising from business done in Minnesota and as fairly proportioned and non-discriminatory, placing no undue burden on interstate commerce.

Minnesota v. Northwestern States Portland Cement Co.,* Hennepin County District Court, August —, 1955. Joseph S. Abdnor, Assistant Attorney General; Miles Lord, Attorney General; George R. Johnson, Assistant Attorney General, for plaintiff. Bundlie, Kelley & Maun of St. Paul, for defendant. Commerce Clearing House Court Decisions No. 542088. (*An appeal to the Supreme Court of Minnesota is pending.*)

* The full text of this opinion is printed in the **State Tax Reporter**, Minnesota, page 1701.

NEW MEXICO

Broadcasting company resisting gross receipts tax ruled subject to tax on interstate receipts, and to have burden of establishing interstate receipts not subject to tax.

The plaintiff below, a corporation operating a New Mexico broadcasting station which covered sixteen states, resisted the imposition of a gross receipts tax. Plaintiff's receipts were from advertisers, some of whose activities were primarily intrastate, while the activities of others were on a national or interstate basis.

The New Mexico Supreme Court, in upholding the tax as applied to the plaintiff insofar as receipts from intrastate business was concerned, held: "Some part of plaintiff's gross proceeds, that part received for local, that is, *intrastate*, advertising is subject to the tax; and since the evidence of what part reposes in its possession, it thus has the burden of establishing what portion of the tax paid is to be returned to it. Unless and until it does, it has not shown itself entitled to a return of any of it. Unwillingness to disclose this evidence will not amount to inability to do so."

Albuquerque Broadcasting Company v. Bureau of Revenue of the State of New Mexico,* 281 P. 2d 654. A. T. Hannett, G. W. Hannett and W. S. Lindamood of Albuquerque, for appellee. Albert I. Cornell and Chester A. Hunker of Santa Fe, for appellant. (*Appeal filed in the Supreme Court of the United States, July* 9, 1955; *Docket No.* 217. *Appeal dismissed, October* 10, 1955, *for want of a substantial Federal question.*)

* The full text of this opinion is printed in the **State Tax Reporter**, New Mexico, page 6837.

OHIO

Inclusion of federal securities in franchise tax base of Ohio corporation, upheld.

Appellant Ohio corporation alleged overpayments of its franchise taxes for the years 1947 through 1951, claiming such overpayments resulted from assessments on federal securities owned by it and improperly required to be incorporated in its franchise tax base. The company contended that the Ohio franchise tax statutes, as construed and applied in this instance by the Tax Commissioner, imposed a direct tax upon United States securities and interest thereon contrary to Section 742, Title 31, U. S. Code, and Section 8,

Article 1, of the United States Constitution.

A decision by the Board of Tax Appeals adverse to the corporation was affirmed by the Ohio Supreme Court.

*Raymond Bag Company v. Bowers,** 163 O. S. 275, 126 N. E. 2d 321. Turner, Wells & Courson and Paul H. Granzow of Dayton, for appellant. C. William O'Neill, Attorney General, and Jack H. Bertsch, Assistant, for appellee. (*Appeal filed in the Supreme Court of the United States, August* 12, 1955; *Docket No.* 316.)

* The full text of this opinion is printed in the **State Tax Reporter**, Ohio, page 11,365.

PENNSYLVANIA

Intangible assets of domestic corporation, engaged in business outside Pennsylvania, ruled to have situs in state at domicile of owner for purposes of apportionment of capital stock tax.

The Court of Common Pleas, Dauphin County, in an appeal by the defendant corporation attacking a final determination of the state taxing officials fixing its capital stock tax, observed that the question involved was: "Do the intangible assets of the defendant have a situs in Pennsylvania for capital stock tax purposes?"

The defendant, a domestic corporation with a registered office in Florida, was engaged exclusively in construction work for the United States Government outside of Pennsylvania. All contracts were negotiated and effected by its officers working out of the Florida office and all executive and administrative functions were performed there. All stockholders' and directors' meetings were held there as well as all books and records being maintained there. All investments were made, controlled and supervised in Florida and all invoices were sent from there. The corporation kept no inventory in Pennsylvania and employed no salesmen in the state.

During the year in question, the defendant owned intangible assets having a book value of $271,052.92, consisting of cash in the bank, accounts receivable, advances to individuals and special deposits. The Pennsylvania capital stock tax was determined by applying a property allocation fraction consisting of the value of intangibles assigned to Pennsylvania as the numerator and the total value of all property everywhere, tangible and intangible, as the denominator.

The defendant contended that the facts established a situs for intangibles elsewhere than the domicile of the owner—this being the "commercial or business situs". The court observed that "we are strongly of the opinion that both the lower and appellate court decisions of Pennsylvania have clearly held that intangibles are taxable at the domicile of the owner. We are bound by the appellate court decisions". The court ruled that the defendant's intangibles had a tax situs in Pennsylvania for the purpose of apportionment of the capital stock tax and judgment was entered for the state.

*Commonwealth v. Universal Trades, Inc.,** Court of Common Pleas, Dauphin County, August 5, 1955.

* The full text of this opinion is printed in the **State Tax Reporter**, Pennsylvania, page 11,583.

state legislation

Nevada — Senate Bill 199 provides that, upon incorporation, a corporation may not adopt a name the same as, or deceptively similar to, the name of any other corporation formed or incorporated in Nevada or of any foreign corporation authorized to transact business in Nevada or a name reserved for the use of any other proposed domestic corporation.

Senate Bill 200 provides that foreign corporations may no longer be qualified with a name the same as, or deceptively similar to, the name of any domestic corporation or any qualified foreign corporation, or to any name reserved by a proposed domestic corporation.

Chapter 121 removed the former limitation of three years during which the existence of dissolved corporations was continued for the purposes of settling their affairs.

New Hampshire — House Bill 92 adds a new sentence to the section relating to the sale of all of a corporation's property by its stockholders. This sentence provides that a mortgage shall not be construed as a sale within the meaning of the section, and that nothing in the section shall be construed as limiting the authority of the directors of a corporation to mortgage the property and assets of the corporation.

New Mexico — Chapter 163 amends Section 54-501, regarding voluntary dissolution by directors and stockholders, to provide that no corporation may be dissolved until all fees due and all taxes levied against such dissolving corporation have been fully paid.

New York — Chapter 852 clarifies the procedure to be followed on dissolution relating to the liquidation of the corporation, the manner of proving claims against the company, the allowance, disallowance and barring of claims against it, the accounting by and discharge of the surviving directors and the jurisdiction of the court.

North Dakota — House Bill 247 reduces the required period of notice to stockholders, prior to a meeting at which a change in the amount of capital stock is to be considered, from sixty days to fifteen days. Also, where there are non-resident stockholders or stockholders whose addresses are unknown, publication need be made only once a week for two successive weeks, the first publication being at least fifteen days before the meeting, instead of once a week for thirty days prior to such a meeting, as formerly required.

Oklahoma — House Bill 706 provides that a corporation may hold real estate within the state for the purposes of lease or sale to any other corporation, providing that the other corporation could have legally acquired title in the first instance.

Oregon — Senate Bill 164 contains provision that the articles of incorporation need only be filed in duplicate, instead of in triplicate, and that no filing need be made with the county clerk of the county in which the registered office is located.

appealed to the supreme court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

ILLINOIS. Docket No. 66. *Riverbank Laboratories v. Hardwood Products Corporation,* 220 F. 2d 465. (The Corporation Journal, October—November, page 149.) Service of process on foreign corporation—doing business—soliciting orders. **Petition for writ of certiorari filed, May 11, 1955. Petition granted and case transferred to the summary calendar, October 10, 1955.**

NEW JERSEY. Docket No. 63. *Werner Machine Co. v. Director, Division of Taxation,* 107 A. 2d 36, affirmed 110 A. 2d 89. (The Corporation Journal, December 1954—January 1955, page 55.) Franchise tax—inclusion of Federal tax-exempt bonds in basis. **Appeal filed, May 9, 1955. Jurisdiction noted, October 10, 1955.**

NEW MEXICO. Docket No. 217. *Albuquerque Broadcasting Company v. Bureau of Revenue of the State of New Mexico,* 281 P. 2d 654. (The Corporation Journal, December 1955—January 1956, page 175.) Broadcasting company—gross receipts tax—receipts from interstate commerce. **Appeal filed, July 9, 1955. October 10, 1955: Appeal dismissed for want of a substantial Federal question.**

OHIO. Docket No. 316. *Raymond Bag Company v. Bowers,* 163 O. S. 275, 126 N. E. 2d 321. (The Corporation Journal, December 1955—January 1956, page 175.) Franchise tax base—inclusion of Federal securities. **Appeal filed, August 12, 1955.**

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* Data compiled from **CCH U. S. Supreme Court Bulletin, 1955-1956.**

regulations and rulings

Arizona — The State Constitution exempts from all taxation the inventory of a manufacturer or manufacturing establishment within the state which is "principally engaged in the manufacture of products." This does not apply to processing. The facts must be examined in every case to determine the classification. The exemption is strictly construed. (Opinion of the Attorney General, State Tax Reporter, Arizona, ¶ 24-017.)

Delaware — A Delaware company which has not done any business for which it was incorporated, and which has no issued shares and no assets, may file an annual report showing "none" in issued shares and "none" in item 10, and sign affidavit B and have it notarized. It will be assessed the minimum tax of $5.50. Par shares only are assessed the minimum tax. The no par shares will be assessed on a shares basis, and half-rate if affidavit C is filled in. (Letter of Secretary of State, State Tax Reporter, Delaware, ¶ 6-405.15.)

New York — When a real estate corporation distributes its own par value stock, on the basis of a transfer of earned surplus to capital, the distribution is a dividend for purposes of the franchise tax imposed under Section 182, Tax Law. (Opinion of the Attorney General to the Department of Taxation and Finance, State Tax Reporter, New York, ¶ 98-675.)

The retroactive repeal of Sections 452 and 462 of the Internal Revenue Code of 1954, which deleted former provisions permitting a corporation to defer prepaid income and to deduct reserves for estimated expenses in computing net income subject to Federal tax, necessarily applies to entire net income for 1954 and subsequent years for purposes of the tax imposed by Article 9-A, New York Tax Law. A corporation which elected to claim deductions under these sections and is, therefore, required to file Federal form 2175, may, in lieu of filing an amended franchise tax report under Article 9-A, file a photostatic or other copy of form 2175, together with any riders attached thereto, certified by an officer of the corporation. The copy of Federal form 2175 must be filed with the State Tax Commission, Corporation Tax Bureau, on or before December 15, 1955, and will be accepted without penalty or interest if so filed, providing any additional tax due is remitted at the time of filing the copy of Federal form 2175. (Opinion of Deputy Commissioner and Counsel, State Tax Reporter, New York, ¶ 98-697.)

A stock corporation organized under the laws of New York is required to have a minimum of three directors. (Opinion of the Attorney General, New York Corporation Law Reporter, ¶ 11,172.)

North Carolina — The mere appointment of an agent for service of process in North Carolina would not affect the question of whether or not a corporation was doing business in North Carolina for franchise and income tax purposes. (Opinion of the Attorney General, State Tax Reporter, North Carolina, ¶ 200-054.)

some important matters

For December and Januar

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

Alabama — Annual Application Fee for permit to do business due on or before February 1.

Alaska — Annual Corporation Tax due on or before January 1.

Arizona — Quarterly Withholding Tax due on or before January 31.

Colorado — Quarterly Withholding Tax due on or before January 31.

Delaware — Annual Report due on or before first Tuesday in January.—Domestic Corporations.

Withholding at Source Returns due January 31.—Corporations paying compensation to Delaware employees.

District of Columbia — Annual Report published and filed between January 1 and January 20.—Domestic Corporations formed under 1901 Act.

Application for license in connection with District Franchise (Income) Tax due before January 1.

Georgia — Annual License Tax Report due on or before January 1.

Indiana — Information and Withholding Returns due on or before January 31

Iowa — Quarterly Retail Sales Tax due on or before January 31.

Kentucky — Quarterly Withholding Tax due on or before January 31.

Louisiana — Annual Report due February 1.—Domestic Corporations.

Maryland — Quarterly Withholding Tax due on or before January 31.

Missouri — Annual Franchise Tax due on or before December 31.

Quarterly Retail Sales Tax due on or before January 15.

New Hampshire — Annual Maintenance Fee due on first business day of January.—Foreign Corporations.

North Dakota — Quarterly Retail Sales Tax due on or before January 31.

Oregon — Quarterly Withholding Tax due on or before January 31.

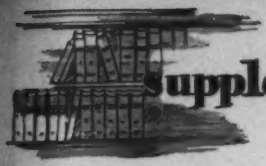
South Carolina — Annual Statement due January 31.—Foreign Corporations

South Dakota — Quarterly Retail Sales Tax due on or before January 15.

Utah — Quarterly Retail Sales Tax due on or before January 30.

Vermont — Quarterly Withholding Tax due on or before January 31.

West Virginia — Annual Business and Occupation (Gross Sales) Tax due January 31.



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In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York 5, N. Y.

Spot Stocks Mean More Sales. A review of the advantages *and* dangers of using spot stocks at strategic shipping centers to bolster and increase sales.

Corporate Tightrope Walking. A look at recent developments which affect corporations carrying on business in interstate commerce.

Agent for Process. Case histories of corporation officials who suddenly found out that trouble can take funny bounces when statutory representation is entrusted to a business employee.

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A Pretty Penny . . . Gone! The troubles that descend upon a corporation—as shown by actual court cases—if its agent cannot be found when service of process is attempted.

Suppose the Corporation's Charter Didn't Fit! Shows how charter provisions which suit well enough at time of organization may be handicaps for the corporation in later life—some measures to avoid them that a lawyer may help his client to take.

Some Contracts Have False Teeth. Interesting case-histories showing advisability of getting lawyer's advice before contracting for work outside home state, even for federal government.

When a Corporation Is P. W. O. L. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

What Constitutes Doing Business (1951 Edition). A 192-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business."

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